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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

THE SCO GROUP, INC., by and through the Chapter 11 Trustee in Bankruptcy, Edward N. Cahn, Plaintiff/Counterclaim-Defendant, vs. NOVELL, INC., a Delaware corporation, Defendant/Counterclaim-Plaintiff.	**SCO'S PROPOSED JURY INSTRUCTIONS** Civil No. 2:04 CV-00139 Judge Ted Stewart

Plaintiff-counterclaim/defendant, The SCO Group, Inc. (SCO), by and through the Chapter 11 Trustee in Bankruptcy, Edward N. Cahn, respectfully submits the following proposed jury instructions. Novell is submitting competing instructions. SCO indicates the corresponding instruction, if any, at the bottom of each of its proposed instructions.

DATED this 1st day of March, 2010.

By: /s/ Brent O. Hatch
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SCO'S PROPOSED INSTRUCTION NO. 1:

The Element of a False Statement

The first element of a claim for slander of title is that the defendant has made a false statement claiming to own the property at issue. There are several statements at issue that the plaintiff contends are false statements.

Among the conduct that you are entitled to regard as "statements" are the parties' filing of copyright registrations. The filing of such registrations does not mean that the filing party actually owns the copyrights identified in the registrations.

You must determine whether, in the various statements at issue in this case, and taken in context, the defendant intended to convey the message that it owns the UNIX and UnixWare copyrights.

You may determine that the plaintiff intended to convey that message even if the defendant has couched its statements in the form of an opinion, such as by conveying its "opinion" or "belief." That is because an expression of opinion or belief may often imply an assertion of objective fact.

You must also determine whether the defendant's statements were false.

"False" means that the statement is either directly untrue or that an untrue inference can be drawn from the statement. You are to determine the truth or falsity of the statement according to the facts as they existed at the time defendant made the statements.

The statement, to be true, must be substantially true. A statement is considered to be true if it is substantially true or the gist of the statement is true.

Milkovich v. Lorain Journal Co., 497 U.S. 1, 11-19 (1990)

Russell v. Thomson Newspapers, Inc., 842 P.2d 896, 902 (Utah 1992)

Model Utah Jury Instructions – Civil § 10.4

Novell's Competing Instructions: 1 & 2

SCO'S PROPOSED INSTRUCTION NO. 2:

The Element of Copyright Ownership: Amended Asset Purchase Agreement

The element of a false statement concerns who owns the property at issue. On that issue, you should consider the Asset Purchase Agreement, as amended.

The parties to the amended Asset Purchase Agreement were Santa Cruz and Novell, but SCO now stands in the shoes of Santa Cruz. That is because several years ago SCO acquired from Santa Cruz all of the UNIX and UnixWare assets that Santa Cruz had acquired from Novell.

You should be guided by the following legal principles in interpreting the amended Asset Purchase Agreement.

Amendment No. 2 must be considered together with the Asset Purchase Agreement as a single document.

The language of Amendment No. 2 controls wherever its language contradicts the Asset Purchase Agreement.

The contractual language of Amendment No. 2 is ambiguous. Accordingly, what is called the "extrinsic evidence" of the parties' intent is relevant to interpreting the combined APA and Amendment No. 2.

I will explain to you in a few minutes the kind of evidence that constitutes relevant "extrinsic evidence."

SCO Group, Inc. v. Novell, Inc., 578 F.3d 1201, 1210-11, 1214 n.2 (10th Cir. 2010)

Novell's Competing Instruction: None

SCO'S PROPOSED INSTRUCTION NO. 3:

The Element of Copyright Ownership: Prima Facie Evidence

With respect to who owns the property at issue, copyright registrations are called "prima facie" evidence that the party who possesses the registrations owns the copyrights, and that the copyrights are valid. "Prima facie" means that on first examination, a matter appears to be self-evident from the facts.

La Resolana Architects, PA v. Clay Realtors Angel Fire, 416 F.3d 1195, 1202-03 (10th Cir. 2005)

Novell, Inc. v. Network Trade Ctr., Inc., 25 F. Supp. 2d 1218, 1229 (D. Utah 1997)

Motorola, Inc. v. Pick, 2005 WL 5918849, at *3 (C.D. Cal. May 26, 2005)

Scanlon v. Kessler, 11 F. Supp. 2d 44, 447 (S.D.N.Y. 1998)

Novell's Competing Instruction: None

SCO'S PROPOSED INSTRUCTION NO. 4:

The Element of Copyright Ownership: Interpretation of Contractual Terms

With respect to your consideration of the amended Asset Purchase Agreement, and other agreements at issue here, where contract terms are clear, they should be given their plain and ordinary meanings.

You should interpret a contract to give meaning to all of its provisions, instead of leaving a portion of the writing useless or inexplicable. You should not interpret a contract to render one of its terms meaningless.

You should interpret a contract as a whole, with each clause helping to interpret the other.

SCO Group, Inc. v. Novell, Inc., 578 F.3d 1201, 1210-11, 1223 (10th Cir. 2010)

Kavruck v. Blue Cross of Cal., 134 Cal. Rptr. 2d 152, 159 (Cal. App. 2003)

Cooper v. Mart Assocs., 225 Cal. App. 2d 108, 114-16 (1964)

Heidlebaugh v. Miller, 271 P.2d 557, 559 (Cal. Ct. App. 1954)

Novell's Competing Instruction: 7

SCO'S PROPOSED INSTRUCTION NO. 5:

The Element of Copyright Ownership: Extrinsic Evidence

With respect to who owns the property at issue, you should consider what is called the "extrinsic evidence" of the intent of the parties to the amended Asset Purchase Agreement. The "extrinsic evidence" is the evidence of what parties to a contract intended apart from the language they used in the contract.

Extrinsic evidence can aid you in determining the circumstances under which the parties negotiated a contract.

The evidence of the business negotiators' intent concerning the Asset Purchase Agreement and Amendment No. 2 is relevant. Such evidence may take the form of witness testimony or documentary evidence of what they said or did or understood at the time of the transaction.

Another type of extrinsic evidence is called the parties' "course of performance." Course of performance is how, as a practical matter, the parties' interpreted and applied the terms of the contract in the years after the contract was signed.

Indeed, the practical construction the parties placed upon the combined Asset Purchase Agreement and Amendment No. 2 is the best evidence of their intention. That is because parties are far less likely to have been mistaken as to the intention of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences have impelled them to resort to law, and when one of them then seeks a construction at variance with the practical construction they have placed upon it.

Another type of relevant extrinsic evidence is the customs or practices within a particular field or industry. You may consider the testimony of either laypersons or experts in assessing any such customs or practices.

SCO Group, Inc. v. Novell, Inc., 578 F.3d 1201, 1210-11, 1217 (10th Cir. 2010)

Cal. Civ. Code § 1647

Universal Sales Corp., Ltd. v. Cal. Press Mfg. Co., 128 P.2d 6765, 671-72 (Cal. 1942)

Novell's Competing Instructions: 7& 8

SCO'S PROPOSED INSTRUCTION NO. 6:

The Element of Copyright Ownership: Relevance of Copyright Ownership

With respect to who owns the property at issue, and your consideration of the amended Asset Purchase Agreement, you should consider the nature of a copyright.

Copyright is the exclusive right to copy. The owner of a copyright has the exclusive right to make and distribute copies of the copyrighted work, to display publicly the copyrighted work, and to license the right to use the copyrighted work to other people. The owner of a copyright also has the exclusive right to bring claims in court to enforce the copyright against people who are infringing on the copyright. The owner can also license that right to someone else, but only through an express, exclusive license.

You therefore should also consider the issue of a "license" to use copyrighted material. There are different types of licenses. One distinction is between "express" and "implied" licenses.

An "express" license is found in a contract that clearly states that one party to the contract has a "license."

An "implied" license is found in a contract that does not use the word "license," but from whose terms you can conclude that one party has the right to use the copyrighted material.

Implied licenses usually are found where one party has created a work at the other's request and handed it over, intending that the other copy and distribute it.

Another distinction, which is related to the difference between an "express" and an "implied" license, is the difference between an "exclusive" and a "non-exclusive" license to use copyrighted material.

An exclusive license means that only the exclusive licensee can use the copyrighted material, whereas an implied license means that several licensees can use the copyrighted material.

The distinction between an "exclusive" and a "non-exclusive" license to use copyrighted material is relevant for two mains reasons.

First, an implied license can only be non-exclusive.

Second, an implied licensee, because he is a non-exclusive licensee, cannot bring lawsuits to enforce the copyrights against people who may be violating them.

Gillespie v. AST Sportswear, Inc., 2001 WL 180147, at *7 (S.D.N.Y. Feb. 22, 2001)

SHL Imaging, Inc. v. Artisan House, Inc., 117 F. Supp. 2d 301, 316 (S.D.N.Y. 2000)

Schiller v. Schmidt, Inc. v. Nordisco Corp., 969 F.2d 410, 413 (7th Cir. 1992)

SmithKline Beecham Consumer Healthcare, L.P. v. Watson Pharms., Inc., 211 F.3d 21, 25 (2d Cir. 2000)

R. Ready Prods., Inc. v. Cantrell, 85 F. supp. 2d 672, 684 n.1 (S.D. Tex. 2000)

Novell's Competing Instructions: 10-12

SCO'S PROPOSED INSTRUCTION NO. 7:

The Element of Malice

The third element of a claim for slander of title is that the defendant must have made its false statements with malice.

A defendant has acted with malice when it published its statement with an intent to injure, vex, or annoy the plaintiff.

A defendant has acted with malice when it published its statement because of hatred, spite, or ill will toward the plaintiff.

You may infer that a defendant has acted with malice when the defendant knowingly and wrongfully records or publishes something untrue or spurious or which gives a false or misleading impression adverse to the plaintiff's title under circumstances that it should reasonably foresee might result in damage to the plaintiff.

Court's Memorandum Decision and Order dated June 27, 2005, at 12 (citing authority)

New York Times Co. v. Sullivan, 376 U.S. 254 (1964)

Model Utah Jury Instructions – Civil § 10.7

Novell's Competing Instruction: 3

SCO'S PROPOSED INSTRUCTION NO. 7.1:

Optional Instruction If Court Charges on First Amendment Issue

I will also ask you to determine whether the plaintiff has shown by clear and convincing evidence that the defendant has acted with what is called "actual malice."

A defendant has acted with actual malice when it published its statement either knowing that the statement was false or else was acting in reckless disregard of whether its statement was false, which means that the defendant acted with a high degree of awareness of the probable falsity of the statement, or that, at the time the statement was made, the defendant had serious doubts that the statement was true.

New York Times Co. v. Sullivan, 376 U.S. 254 (1964)

Model Utah Jury Instructions – Civil § 10.7

Novell's Competing Instruction: 3

SCO'S PROPOSED INSTRUCTION NO. 8:

The Defense of Privileges

A defendant to a claim for slander of title may assert what are called "privileges" to have made the statements at issue. The defendant has the burden of proving that a privilege applies.

That is, a publisher of statements may have what is called a "conditional" or "qualified" privilege to make those statements. There are several privileges which may be applicable.

The first privilege is the absolute privilege for litigation.

The purpose of this privilege is to promote candid and honest communication between the parties and their counsel in order to resolve disputes. Accordingly, the privilege generally applies to a party to a private litigation. In order to find that this privilege applies, you must conclude that a party made its statements as part of candid and honest communication in order to resolve a potential or pending lawsuit between the parties.

The second privilege is the "legitimate interest" privilege.

The purpose of this privilege is to permit a party to publish a statement where the recipient of the statement is one to whom the publisher is under a legal duty to publish the matter or is a person to whom its publication is otherwise within the generally accepted standards of decent conduct. In order to find that this privilege applies, you must conclude that a party was under a legal duty to publish its statements to the public or conclude that its publications of its statement to the public was within the generally accepted standards of decent conduct.

The third privilege is the “rival claim” privilege.

The purpose of that privilege is to permit a rival claimant to disparage another’s property by asserting an inconsistent legally protected interest in itself. The statement must be made honestly and in good faith.

Court’s Memorandum Decision and Order dated June 27, 2005, at 10-12 (citing authority)

Hansen v. Kohler, 550 P.2d 186, 189-90 (Utah 1976)

O’Connor v. Burningham, 165 P.3d 1214, 122-23 (Utah 2007)

Krouse v. Bower, 20 P.3d 895 900 (Utah 2001)

Novell’s Competing Instruction: 5

SCO'S PROPOSED INSTRUCTION NO. 9:

Abuse of Privileges

Although you may find that the foregoing privileges exist, where the disparaging statement was published maliciously or in bad faith, the defendant has published the matter without privilege to do so.

That is, no privilege applies if a party acted with malice or otherwise transcended the scope of the privilege.

A defendant transcends the scope of the privilege if it excessively publishes the statement at issue or acts inconsistent with the purpose of the privilege. A statement is excessively published if it is published to more persons than the scope of the privilege requires to effectuate its purpose.

Court's Memorandum Decision and Order dated June 27, 2005, at 11-15 (citing authority)

Novell's Competing Instruction: 5

SCO'S PROPOSED INSTRUCTION NO. 10:

The Element of Damages on Slander of Title

The final element of a claim for slander of title is that the defendant's statements have caused the plaintiff to suffer "special damages."

A defendant's conduct has "caused" the plaintiff's damages where the defendant's conduct was a substantial factor in causing such damages.

The special damage rule requires the plaintiff to establish pecuniary loss that has been realized or liquidated, as in the case of specific lost sales. Damages are ordinarily proved in a slander of title action by evidence of a lost sale or the loss of some other pecuniary advantage. Absent a specific monetary loss flowing from a slander affecting the saleability or use of the property, there is no damage.

Plaintiff's pecuniary loss may be established by proof that the loss has resulted from the conduct of a number of persons whom it is impossible specifically to identify.

Court's Memorandum and Decision dated January 28, 2010, at 11 (citing authority)

Restatement (Second) of Torts §§ 632, 633

Dowse v. Doris Trust Co., 208 P.2d 956 (Utah 1949)

Novell's Competing Instructions: 4 & 6

SCO'S PROPOSED INSTRUCTION NO. 11:

Punitive Damages

You are also entitled to award the plaintiff "punitive damages" if you deem them to be appropriate.

Before any award of punitive damages can be considered, the plaintiff must prove by clear and convincing evidence that the defendant published a false statement knowing it was false or in reckless disregard of whether it was true or false, and that the defendant acted with hatred or ill will towards the plaintiff, or with an intent to injure the plaintiff, or acted willfully or maliciously toward the plaintiff.

If you find that plaintiff has presented such proof, you may deem it proper for punitive damages to be awarded, in which case you should specify the amount. In determining the amount, you may award such sum as in your judgment would be reasonable and proper as a punishment to the defendant for its wrongs, and as a warning to others not to commit similar wrongs.

Model Utah Jury Instructions – Civil § 10.12

Novell's Competing Instruction: None